Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SWD:PNX:TL-N-4147-99-LO
JWDuncan

date: NOV 19 [illegible]

to: Chief, Examination Division, Southwest District
Attn: William Kennedy

from: District Counsel, Southwest District, Phoenix

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subject: [redacted] spinoff

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

We originally advised you in this matter by memorandum dated July 14, 1999. You have advised us that [redacted] has suggested that it is entitled to deduct the disputed expenses under the principles espoused in United States v. General Bancshares Corporation, 388 F.2d 184 (8th Cir. 1968).

We believe that this case does not negatively affect the Service's position. This case involved a bank holding company, which pursuant to the Bank Holding Act of 1956, was required to divest itself of certain assets or else be in violation of that law. The Federal Reserve Board approved the taxpayer's plan of divestment, which consisted of transferring all non-banking assets to a new corporation in exchange for the shares of the new corporation. The taxpayer then distributed these shares pro rata

to shareholders of the corporation. The court allowed expenses of this divestment plan to be deducted. In doing so, it found that the divestment "could be characterized as a partial liquidation for the purpose of determining whether expenses incurred in the liquidation were ordinary and necessary or capital in nature . . . ." Id. at 191. The court further stated that even in a § 346 liquidation, such expenses could be capital expenses if there is more than an incidental benefit to the taxpayer. The court, however, specifically found "that the divestiture did not add anything of value to its corporate structure." Id. at 191.

In the present situation, the taxpayer would be hard pressed to claim that the transaction at issue qualified under § 346, as the taxpayer sought and received a private letter ruling to the effect that the transaction constituted a reorganization under § 368, without any suggestion that the transaction might also qualify under § 346. More importantly, we understand that you have obtained substantial evidence of the taxpayer's expectation of substantial benefit from this transaction, including statements filed with the Securities and Exchange Commission and provided to shareholders in order to obtain their approval of the reorganization. We therefore believe that the opinion in General Bancshares has no effect on our prior advice that the expenses at issue are capital in nature.

Please note that we do not consider the advice rendered above to be significant large case advice, so that you may take immediate action regarding these matters. If you have any questions regarding this matter, please contact the undersigned at (602) 207-8052.

DAVID W. OTTO
District Counsel

By: _____
JOHN W. DUNCAN
Attorney

cc: Assistant Chief Counsel (Field Service)
Assistant Regional Counsel (LC)(SF), Western Region